No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

ALBERT MICHELSON,
Russ Building, San Francisco,
Proctor for Appellant.

HERBERT CHAMBERLIN,
Russ Building San Francisco,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

The appeal is by the libelant Theodore F. Bovich, in a seaman's action, from a final decree dismissing the first cause of action in his libel.

STATEMENT OF JURISDICTION.

The libel contained two causes of action. (A 4-10.) The first cause of action (A 4-8) was based on the Jones Act (46 U.S.C.A., sec. 688), made applicable to employees on United States vessels by Public Law 17 (50 U.S.C.A. Appx., sec. 1291), and enforceable against the United States under the Suits in Admiralty Act (46 U.S.C.A., secs. 741-752). The second cause of action was based on general admiralty law

for maintenance. (A 8-9.) The District Court had jurisdiction. (28 U.S.C.A., sec. 41 (3).) Final decree was entered in the District Court on March 11, 1947. (A 25.) An order allowing appeal was entered April 28, 1947. (A 27.) The appeal was timely. (28 U.S. C.A., sec. 230.) Jurisdiction of this court to review the final decree of the District Court is therefore sustained by section 128 of the Judicial Code, amended. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

The first cause of action in the libel alleged that on January 3, 1945, libelant received personal injuries in the course of his employment as an able-bodied seaman on respondent's steamship Charles J. Colden while the vessel was loading at Oro Bay, New Guinea. (A 47.) Negligence was ascribed to respondent in loading and in ordering libelant to work at a dangerous place under dangerous conditions with resulting injury. (A 5-6.) Damages in the sum of $25,000 were sought. (A 7.) Due presentation of a claim and disallowance thereof were alleged. (A 7.) The second cause of action sought maintenance on allegations that the injuries had totally disabled libelant since January 3, 1945, and that a balance of $1793.75 was unpaid. (A 8-9.) Suit was filed March 18, 1946. (A 10.)

Respondent's answer admitted ownership and operation of the vessel, the employment of libelant and injury in the course of employment, and presentation

and disallowance of claim. (A 11-12.) Negligence and damages were denied. (A 11-12.) Liability at the rate of $3.50 per day for maintenance was conceded. (A 13-14.)

The testimony at the trial was undisputed and consisted of the examination and cross-examination of witnesses produced by libelant. No witnesses were produced by the respondent.

At the time of the accident on January 3, 1945, the steamship Charles J. Colden was moored port side to the dock at Oro Bay, New Guinea. (A 40-41.) About 8 o'clock of that morning a garbage scow had come to the starboard side of the vessel, and after garbage had been dumped into the scow the vessel's empty garbage cans were left on the starboard side just aft of No. 4 Hatch. (A 47, 56.) There were about 12 of these cans. (A 43.) Each can was about 3 to 3½ feet high and 2½ feet in diameter. (A 46.)

Around 9 o'clock of the same morning libelant and one Kazem-Beck, another able-bodied seaman, were working forward of the midships house "up at No. 1 Hatch". (A 42, 65-66.) They were ordered by the boatswain "to go back aft to No. 4 hatch" and move the empty garbage cans "forward next to the deck house" on the starboard side, a distance of 50 to 60 feet. (A 42-43, 47.) At the time this order was given loading operations were being conducted at No. 4 Hatch (A 43) by army-stevedores operating from the port side of the vessel (A 58). Libelant and Kazem-Beck immediately obeyed the order. (A 43.) The

boatswain did not accompany them. (A 43.) When they got back to No. 4 Hatch they found that two large crates containing "either a tractor or a tank, or something of that sort" had been loaded "on the starboard side of No. 4 Hatch". (A 44.) Each was about "12 feet long by 7 feet high, by about 8 feet wide". (A 44.) "They were located on the starboard side of the ship, about between a foot and a half and two feet from the taffrail or top of the bulwark, and were about three feet from each other". (A 45.) One of the crates was about 3 feet over the hatch. (A 58.) There were two possible ways to move the garbage cans—one was the outside passage, that is, between one of the crates and the starboard taffrail—the other was the inside passage—that is, between the two crates. (A 45-46.) Libelant and Kazem-Beck first used the outside passage. The result was disastrous. Kazem-Beck testified: "There was one possible way to carry them which was on the outside, about a two or two and one-half foot space between the taffrail and the first box. I tried to do it, but the ship had a starboard list, the taffrail was slippery, because of the garbage that had been dumped over. When I tried to, I slipped and fell, the garbage can fell overboard, and I had a bad bruise on the inside of my thigh." (A 47.) Libelant was following Kazem-Beck and saw what happened when the outside passage was used. He then used the inside passage. Again the result was disastrous. He testified: "Well, he took the first can, sir. Then I followed him with another one. As he slipped and fell, I still was coming in back of him

with mine, my can, and I put it down, and he sat down to look at his leg. So I went back to get another can, and came through this passageway. I got in there and they had lifted another box onto the boom. They were swinging one over and hit this box on No. 4 Hatch, causing it to come over and hit my leg, caught my leg between the can and the box." A 68-69.) As to the accident to libelant, Kazem-Beck gave this testimony: "Well, the trouble was caused by the fact that there were only two possible ways of carrying these garbage cans, either the way I tried first, which was not successful because I slipped and fell, and the second way was the way Mr. Bovich tried, between the two boxes. There was about a three-foot space in between. So he was dragging an empty garbage can behind him. * * * I saw Mr. Bovich start to drag the can. He was backing up, dragging the garbage can behind him, and what happened is this, that he went through where the Army stevedores, when they were placing the next big wooden box with what we call heavy winches, approximately two tons, they hit the adjacent box, the adjacent box moved, and jammed his leg against the garbage can, which, in turn, was jammed against the next box and crushed his leg". (A 48-49.)

The trial court, although accepting the testimony of libelant and Kazem-Beck at par, was of the opinion that negligence on the part of respondent was not shown. (A 14-17.) It made findings against libelant on the issues of negligence and damages (A 18-22), but found that libelant was entitled to maintenance

in the sum of $945. (A 20-23.) It entered a decree dismissing the first cause of action in the libel, and awarding maintenance in the sum of $945 on the second cause of action. (A 25.)

The appeal is concerned with the first cause of action. In this connection it is the position of appellant that the findings against him are clearly erroneous and that he is entitled to a decree awarding him damages.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON.

Appellant relies upon each of his assigned errors, namely, No. (1) to No. (14), both inclusive. (A 28-32.)

ARGUMENT OF THE CASE.

Summary of Argument.

The order of the boatswain was clearly negligent. No necessity existed for ordering the seamen to move the garbage cans while loading operations were in progress. By the order of the boatswain appellant was needlessly required to work in a dangerous place and under dangerous conditions. The libelant was bound to obey the order of the boatswain, even though the order required him to work under unsafe conditions, and he did not assume the risks of such obedience. When the seamen were required to work under unsafe conditions disclosed by the circumstances of the case, the dictates of common prudence demanded

adequate supervision and direction of the work by the boatswain or some officer of the vessel in order that the seamen be safeguarded. None was furnished. Want of ordinary care on the part of appellee and its agents and employees was the sole proximate cause of appellant's injury. The District Court erred in denying libelant recovery under his first cause of action based on the Jones Act. Its findings that respondent was not negligent, are clearly erroneous. The same is true respecting its findings that libelant's injuries were caused solely by his own negligence, and its findings that libelant did not suffer damage by reason of respondent's negligence. An appeal in admiralty is a trial de novo, and this court should enter a decree awarding appellant appropriate damages on his said first cause of action.

---

1. **THE DISTRICT COURT ERRED IN DENYING LIBELANT RECOVERY UNDER HIS FIRST CAUSE OF ACTION BASED ON THE JONES ACT.**

Assignment of Error No. 1: "The court erred in dismissing the first cause of action in the libel." (A 28.)

Assignment of Error No. 2: "The court erred in decreeing that libelant take nothing by his first cause of action." (A 28.)

The order of the boatswain was clearly negligent under the circumstances of the case. He ordered appellant and Kazem-Beck, another able-bodied seaman, then working forward at No. 1 Hatch (A 42,

65-66), "to go back aft to No. 4 Hatch" and move the empty garbage cans "forward next to the deck house" on the starboard side, a distance of 50 to 60 feet (A 42-43, 47). Loading operations were then being conducted at No. 4 Hatch (A 43) by army stevedores operating from the port side of the vessel (A 58). No necessity existed for ordering the seamen to move the garbage cans while loading operations were in progress. (A 52.) Two cans were available to the steward's department on the port. After appellant was injured no cans were moved until loading operations were over. (A 52.)

The order of the boatswain is therefore properly characterized as needless and inopportune and one that unnecessarily placed in jeopardy the safety of those to whom it was given. It was an order of the type considered by this court in *Matson Navigation Co. v. Hansen,* 132 F2d 487, where it was said, at pages 488 and 489:

> (488) "The complaint invokes the provisions of the Jones Act, 46 U.S.C.A., sec. 688, and the question is whether the place in which appellee was required to work was reasonably safe in the circumstances existing at the time. Obviously, the test of reasonable safety varies with the prevailing conditions. No liability flows from requiring a sailor to perform his necessary sailor's duties with the ship rolling and lurching in a heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck. Yet the owner would be liable if, instead of performing some necessary duty, he were injured when sent by the mate across the same

wave swept deck to rescue the ship's cat. The test is whether the requirement is one which a reasonably prudent superior would order under the circumstances. American Pacific Whaling Co. v. Kristensen, 9 Cir., 93 F2d 17.

(489) "Appellant claims that while at sea it was customary to employ the sailors in the operating of raising the cargo booms from their deck fastenings to a position alongside the mast, to have them ready to discharge cargo at Honolulu, and that it was proper to employ appellee in such customary manner. However, the custom does not cover the case of such working of the crew after a storm has so disarranged the deck cargo, which is also made slippery by grease. There was no need so to raise the boom in a rolling sea and the operation could have waited the smooth waters of Honolulu harbor."

And the same type of order was considered by the Court of Appeals for the District of Columbia in *United States S. B. E. F. Corp. v. O'Shea,* 5 F2d 123, where it was said, at page 125:

(125) "The appellant furthermore contends that the evidence in the case failed to sustain the charge of negligence upon the part of the officers of the vessel. That contention must be overruled upon the facts appearing in the record; for the officers did not exercise reasonable care for the plaintiff's safety, when they required him to perform the work in question under the circumstances disclosed by the evidence. It is conceded that a ship's officers made be justified under given circumstances in ordering seamen into positions of great personal peril in the performance

> of their duty, but no such circumstances existed in this case. Neither the safety of the vessel nor the preservation of the cargo required that the oil should be cleaned up while the ship was at sea in such weather, nor was the oil then needed for the operation of the ship. The plaintiff in fact was needlessly exposed to obvious danger of great bodily harm by the imperative command of the ship's officers; this was negligence upon the part of the officers, and the plaintiff's injury was the direct result of it."

By the order of the boatswain appellant was needlessly required to work in a dangerous place and under dangerous conditions. On the port side, cargo was being worked by the army-stevedores. (A 58.) On the port side, booms, tacks, riggings, and heavy crates were moving overhead. It is perhaps unnecessary to mention to this court that one of the elementary and obvious precautions for seamen is "Never walk on the side of the vessel on which cargo is being worked." On the starboard side, two heavy crates, 12 feet long, 7 feet high, 8 feet wide, had been loaded at No. 4 Hatch. (A 44.) The space between the starboard taffrail and the nearest crate was about 2 feet. (A 45.) The space between the two crates was about 3 feet. (A 45.) In obeying the order of the boatswain and moving the garbage cans forward the seamen had the alternative of using the outside passage between the taffrail and the crate or the inside passage between the two crates. That it was dangerous to use the outside passage was demonstrated by what happened when the seamen used it. Injury to Kazem-

Beck resulted. That it was dangerous to use the inside passage was demonstrated by what happened when appellant used it. Serious injury to appellant resulted. While he was dragging a garbage can between the two crates in a space 3 feet wide and 8 feet long and with the crates towering above him so that he could not see what was going on, the army-stevedores loaded another crate near No. 4 Hatch in such fashion that it hit and moved one of the other crates, thereby contracting the space through which appellant was passing and causing his leg to be crushed against the garbage can he was dragging.

The libelant was bound to obey the order of the boatswain, even though the order required him to work under unsafe conditions, and he did not assume the risks of such obedience. (*Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 430-433, 59 S.Ct. 262, 266-267, 83 L.Ed. 265; *Darlington v. National Bulk Carriers,* 2 Cir., 157 F2d 817, 819; *Amit v. Loveland,* 3 Cir., 115 F2d 308, 311; *Reskin v. Minnesota etc. Co.,* 2 Cir., 107 F2d 743, 745; *Tampa Interocean S. S. Co. v. Jorgensen,* 5 Cir., 93 F2d 927, 929; *Holm v. Cities Service Transp. Co.,* 2 Cir., 60 F2d 721, 722; *United States v. Boykin,* 2 Cir., 49 F2d 762, 763; *Misjulis v. U. S. S. B. E. F. Corp.,* 2 Cir., 31 F2d 284; *Storgard v. France & Canada S. S. Corp.,* 2 Cir., 263 F. 545.)

When the seamen were required to work under the unsafe conditions disclosed by the circumstances of the case, the dictates of common prudence demanded adequate supervision and direction of the work by the boatswain or some officer of the vessel in order that

the seamen be safeguarded. None was furnished. (A 43.)

The conclusion is therefore irresistible that want of ordinary care on the part of appellee and its agents and employees was the sole proximate cause of appellant's injury. In this connection it is to be noted, moreover, that appellee must be held responsible to appellant for the negligence of the army-stevedores who, equally with appellant at the time of his injury, were in the maritime service of the appellee. (*DeWitt v. United States,* D.C.Wash., 67 F.Supp. 61, 62.)

The facts here are undisputed, and on the facts and the law it follows that the District Court erred in denying libelant recovery under his first cause of action based on the Jones Act.

---

2. **THE FINDINGS OF THE DISTRICT COURT THAT THE RESPONDENT WAS NOT NEGLIGENT, ARE CLEARLY ERRONEOUS.**

Assignment of Error No. 3: "The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading the vessel SS 'Charles J. Colden,' said respondent negligently or in any other manner failed to have any licensed or other officer overseeing or supervising said loading of said vessel." (A 28-29.)

Assignment of Error No. 4: "The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other

time while respondent was engaged in loading said vessel, said bos'n negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon, and that it is not true that at said time there was no clear, open, or safe passage on said deck through which libelant could carry said garbage can without danger of being injured." (A 29.)

Assignment of Error No. 5: "The court erred in finding that no negligent order of any kind was given by said bos'n or any other person to said libelant; that with full knowledge on the part of libelant of the existence and availability of a safe, clear and unobstructed route and passageway through which he should have and could have carried said garbage can, he deliberately and entirely at his own volition and selection chose and used an obviously dangerous route and passageway in the carrying of said garbage can." (A 29.)

Assignment of Error No. 6: "The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other time, respondent, while engaged in loading said vessel, negligently failed to have a clear, open and safe passageway for libelant to carry out any orders given him; and that it is not true that at said time and place, in obedience to any negligent order, libelant was carrying said garbage can along the deck of said vessel between two crates, or that respondent negligently caused or permitted a large crate being loaded on said deck and being carried by ship's gear to negligently strike against another crate, thereby causing last-mentioned crate to strike against and to crush

or injure libelant. And the court erred in finding that it is true that there was a clear, open and safe passageway for libelant's use as aforesaid, and that any movement of said crates was a normal and reasonably to be expected consequence of proper and careful operation of ship's gear in such loading operations, all of which was and should have been known to libelant." (A 29-30.)

Assignment of Error No. 7: "The court erred in finding that libelant was not caused to suffer any injuries as the result of negligence of any kind of respondent." (A 30.)

That the findings challenged by the foregoing assignments were clearly erroneous has been demonstrated by the review of the evidence earlier made in this brief.

It cannot be disputed in this case that the boatswain needlessly and inopportunely ordered appellant to move the garbage cans on the starboard side of the vessel at a time when loading operations endangering his safety in doing such work were in progress. The order was therefore negligent. The findings to the contrary are clearly erroneous.

Nor can it be disputed in this case that at the time appellant was injured cargo was being worked on the port side of the vessel. Therefore the port side of the ship did not furnish a safe place or passageway for moving the garbage cans forward in obedience to the boatswain's negligent order. On the contrary, reason would counsel a seaman in obeying the negligent order of the boatswain under such circumstances

that the use of the starboard side of the vessel even though obstructed by the standing crates would furnish a greater measure of safety than the use of the port side. The use of the starboard side would have undoubtedly furnished a full measure of safety and prevented injury to appellant if the boatswain or some officer of the vessel had supervised or directed the moving of the garbage cans during loading operations, or if the appellee had established and maintained any sort of coordination between those working for it in their various activities. The appellee did not discharge its duties in such respects. Therefore, the appellee was negligent. The findings to the contrary are clearly erroneous. The evidence is susceptible to but one reasonable conclusion and that is that the negligence of appellee proximately caused the appellant's injuries.

---

3. THE FINDINGS OF THE DISTRICT COURT THAT LIBELANT'S INJURIES WERE CAUSED SOLELY BY HIS OWN NEGLIGENCE, ARE CLEARLY ERRONEOUS.

Assignment of Error No. 8: "The court erred in finding that it is true that libelant was negligent in carrying out his duties in that he failed to exercise ordinary prudence or care in passing between the crates on board the main deck of the vessel when he knew other crates were being swung into position on said main deck and that some shifting of crates was usual and to be reasonably expected." (A 30-31.)

Assignment or Error No. 11: "The court erred in finding that injuries sustained by libelant

while in the employ of said vessel were due solely to his own negligence." (A 31.)

The law is plain that libelant was bound to obey the order of the boatswain, even though the order required him to work under unsafe conditions, and he did not assume the risks of such obedience. He was injured while obeying the negligent order of the boatswain and while working under the unsafe conditions for which respondent was responsible. The fault causing injury was therefore the fault of the respondent and not that of the libelant. The findings to the contrary are clearly erroneous.

---

4. **THE FINDINGS OF THE DISTRICT COURT THAT LIBELANT DID NOT SUFFER DAMAGES BY REASON OF RESPONDENT'S NEGLIGENCE, ARE CLEARLY ERRONEOUS.**

Assignment of Error No. 9: "The court erred in finding that it is not true that libelant suffered or incurred general damages in the sum of $25,000, or any other sum or sums or otherwise or at all." (A 31.)

Assignment of Error No. 10: "The court erred in finding that it is not true that libelant suffered, incurred or contracted personal injury or loss of wages or earnings due to any carelessness or negligence on the part of any agent, servant, officer or employee of the said vessel, SS 'Charles J. Colden,' or respondent, United States of America." (A 31.)

The libel alleged that libelant's injuries consisted of "a compound fracture of his right tibia and right

ankle, punctured arteries of said leg, damage to the nerves of said leg and ankle, and great nervous shock." (A 6.) It alleged that at the time he was injured on January 3, 1945, he was earning approximately $400 monthly. It alleged inability to work or earn money since the accident. (A 7.) The libel was filed March 18, 1945. (A 10.) Trial was had on October 4, 1946. (A 35.) Medical testimony at the trial confirmed the allegations of the libel respecting injuries and disclosed permanent injuries. (A 101-106.) Libelant testified that his leg still bothered him. (A 78-79.) He was unable to work until September, 1946, and lost about 19 months wages. (A 114.) This approximated about $7500 in lost wages. (A 115.)

Since the negligence of the respondent is plain on the present record, the findings of the court here under challenge are plainly erroneous.

---

5. **APPELLANT IS ENTITLED TO A DECREE AWARDING HIM APPROPRIATE DAMAGES ON HIS FIRST CAUSE OF ACTION BASED ON THE JONES ACT.**

Assignment of Error No. 12: "The court erred in failing to find and hold that libelant was entitled to recover damages for personal injuries sustained by libelant aboard the SS 'Charles J. Colden'." (A 31.)

Assignment of Error No. 13: "The court erred in failing to find and hold that libelant had sustained the burden of proof of the allegations contained in the first cause of libel." (A 31-32.)

Assignment of Error No. 14: "The court erred in finding and holding that libelant was entitled to recover on his second cause of action only." (A 32.)

Enough has been said to demonstrate the error of the District Court in failing to make such award. As an appeal in admiralty is a trial de novo and the record is plain and plenary a decree should be entered by this court awarding libelant appropriate damages on his first cause of action based on the Jones Act.

CONCLUSION.

Appellant therefore respectfully submits that the decree of the District Court dismissing the first cause of action in the libel should be reversed, and a decree entered awarding the libelant and appellant appropriate damages on the said first cause of action.

Dated, San Francisco,
July 1, 1947.

ALBERT MICHELSON,
Proctor for Appellant.

HERBERT CHAMBERLIN,
Of Counsel.